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10 **UNITED STATES BANKRUPTCY COURT**

11 **NORTHERN DISTRICT OF CALIFORNIA**

12 **SAN JOSE DIVISION**

13 In re Case No. 21-50028 SLJ

14 EVANDER KANE, Chapter 7

15 Debtor.

Honorable Stephen L. Johnson

16 Adversary Proceeding No. 22-05033 SLJ

17 FRED HJELMESET

**DEFENDANT'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

18 Trustee in Bankruptcy,

Date: September 10, 2024

19 Plaintiff,

Time: 1:30 p.m.

20 vs.

Place: Courtroom 10

21 SURE SPORTS, LLC, FKA;
SURE SPORTS LENDING, LLC,

280 South First Street
San Jose, CA 95113
Zoom/Teleconference

22 Defendant.

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Defendant, Sure Sports LLC fka Sure Sports Lending LLC (“Sure Sports”), by and through undersigned counsel, hereby replies to Plaintiff, Fred Hjelmeset, Chapter 7 Trustee (“Trustee”), Opposition to Defendant’s Motion for Summary Judgment (“Opposition”) [D.E. 52] and, in support of Sure Sports’ Motion for Summary Judgment (“Motion for Summary Judgment”) [D.E. 48], states as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

I. Argument

A. Legal Standard

9 The entire premise of Trustee’s Opposition is based upon: (1) unsupported and
10 unsubstantiated expert testimony, and (2) a purposeful misreading of the Miller-Ayala Act (“MAA”)
11 in a manner intended to mislead and/or otherwise confuse the Court into making an overarching
12 decision with numerous unintended consequences as it relates to the application of the clear and
13 unambiguous language of a statute. “Unsupported or conclusory statements of experts are
14 insufficient to raise a genuine issue of material fact precluding summary judgment.” *Hebert v. Allied*
15 *Rubber & Gasket Company*, 632 F. Supp. 3d 1175, 1181 (S.D. Cal. 2022); *see also United States v.*
16 *Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir.1981) (“In the context of a motion for
17 summary judgment, an expert must back up his opinion with specific facts.”); *see Finjan, Inc. v.*
18 *Blue Coat Sys., Inc.*, No. 13-CV-03999-BLF, 2015 WL 3630000, at *11 (N.D. Cal. June 2, 2015)
19 (stating an expert’s conclusory assertions are not sufficient to create a genuine issue of material
20 fact).

B. Sure Sports is Entitled to Summary Judgment Based Upon Plain Meaning of the Miller-Ayala Act.

In attempting to effectuate the purpose of a statute, the Court must examine “the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.” *United States v. HVI Cat Canyon, Inc.*, 213 F. Supp. 3d 1249, 1271 (C.D. Cal. 2016). It is well established that “when the statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.” *Hartford*

1 *Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000).

2 The interpretive rule referred to as the “series-qualifier canon” states, “Under conventional
3 rules of grammar, when there is a straightforward, parallel construction that involves all nouns or
4 verbs in a series, a modifier at the end of the list normally applies to the entire series.” *See Facebook,*
5 *Inc. v. Duguid*, 592 U.S. 395, 402 (2021). “This canon generally reflects the most natural reading of
6 a sentence.” *Id.* This interpretation is subject to the “rule of the last antecedent,” which states “a
7 limiting clause or phrase...should ordinarily be read as modifying only the noun or phrase that it
8 immediately follows.” *See Lockhart v. United States*, 577 U.S. 347, 351 (2016).

9 Sure Sports Motion for Summary Judgment provides that Sure Sports is exempt from the
10 application of the MAA and therefore entitled to summary judgment as to the causes of action
11 asserted in Trustee’s Complaint, because Sure Sports does not meet the definition of an “athlete
12 agent” based upon the clear and unambiguous language contained in the MAA. Specifically, the
13 MAA states the term “athlete agent” “**does not include a person licensed as an attorney, dealer**
14 **in securities, financial planner, insurance agent, real estate broker or sales agent, or tax**
15 **consultant, or other professional person, when the professional person offers or provides the**
16 **type of services customarily provided by that profession.**” Cal. Bus. & Prof. Code
17 §18895.2(b)(2)(A) (emphasis added).

18 Per the “rule of the last antecedent,” the limiting clause (“**when the professional person**
19 **offers or provides the type of services customarily provided by that profession**”) solely applies
20 in the context of “other professional person” referenced in the exclusionary statutory language. Sure
21 Sports provides underwriting services headed by its owner/founder, Leon McKenzie, who has
22 served in a chief underwriting officer capacity in various industry fields over the course of many
23 years (*see, e.g.*, Def. Exh. B. pg. 15-17). Notwithstanding, even if such rule did not apply to limit
24 such clause as referenced – *see Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 344,
25 n.4 (2005) (declining to apply rule where the modifying clause appears after an integrated list) – it
26 follows that the exclusionary language still supports Sure Sports’ argument that the MAA does not
27 apply because Sure Sports is not one of the professions listed in the series as requiring licensure in
28 order to be exempt. Specifically, the statute states an “athlete agent” does not include a person

1 licensed as any of the following: (1) attorney, (2) dealer in securities, (3) financial planner, (4)
2 insurance agent, (5) real estate broker or sales agent, or (6) tax consultant. There is no licensing
3 requirement for commercial loan underwriters contained in the statute, nor is there any licensing
4 requirement for commercial loan underwriters in the state of California, generally. As such, because
5 Sure Sports constitutes an “other professional person...offer[ing] or provid[ing] the type of services
6 customarily provided by that profession,” the exclusionary language should apply. Kane has
7 acknowledged and accepted Sure Sports’ performance of such services as it relates to the money
8 Sure Sports seeks to recover per its Proof of Claim. *See* Def. Exh. F, G, and I (Kane acknowledging
9 Sure Sports has fully performed and completed all underwriting services requested and/or required
10 to be performed).

11 Trustee cites to various cases – none of which are of any precedential value or binding
12 authority upon this Court – for the purpose of disclaiming “underwriting” as a profession. Though
13 the MAA does not expressly define what it means to be a “professional person,” not only are such
14 citations by Trustee non-applicable for the purpose of this case, but Trustee’s entire argument
15 presented is baseless in that Trustee provides zero foundational support to purportedly show how or
16 why underwriting does not meet the definition of a profession.¹ The Deposition of Leon McKenzie
17 clearly shows the obtainment and utilization of certain specialized knowledge used to build Sure
18 Sports’ commercial underwriting practice and provide its services. *See, e.g.*, Def. Exh. B. pg. 15-
19 17.

20 Furthermore, even if the safe harbor provision set forth in Cal. Bus. & Prof. Code
21 §18895.2(b)(2)(A) did not exist, Sure Sports would still fall outside the governance of the MAA,
22 because Sure Sports did not “recruit or solicit” Kane to enter into any financial services contract as
23 required by Cal. Bus. & Prof. Code §18895.2(b)(1). There is no genuine issue of material fact
24 regarding this point per the Deposition of Evander Kane, cited below:

25 **Q. Did Sure Sports ever recruit you to enter into a financial services contract?**

26 Ms. Yu: Objection to the term “financial services contract.”

27 _____
28 ¹ *See* <https://www.merriam-webster.com/dictionary/profession> (defining “profession” as a “calling
requiring specialized knowledge and often long and intensive academic preparation.”)

1 Q. I can define it, Mr. Kane, if you'd like me to, although you did answer questions
2 related to that before. Would you like a definition?

3 A. Sure. Why not.

4 Q. Okay. "Financial services" means the making or execution of an investment or
5 other financial decision or counseling as to a financial decision.

6 A. I thought you said "contract," correct?

7 Q. Correct.

8 A. **No.**

9 Q. **And did Sure Sports ever solicit you to enter into a financial services**
10 **contract?**

11 Ms. Yu: Objection to the extent that it calls for this witness to make a legal
12 conclusion, but he can testify to his own understanding.

13 A. **To my understanding, no.**

14 See Def. Exh. A., at 33:13-34:9 (emphasis added).

15 C. **Sure Sports is Entitled to Summary Judgment Because Kane Has Not Suffered**
16 **Actual Damages.**

17 Following determination that Sure Sports is not subject to the requirements of the MAA, it
18 also follows that Trustee is not subject to any statutory relief as provided per Cal. Bus. & Prof. Code
19 §18897.9(b), including, without limitation, entitlement to refund of any money or other
20 consideration paid pursuant to a contract negotiated by an athlete agent that failed to comply with
21 the MAA. Furthermore, a determination that Sure Sports is not subject to the requirements of the
22 MAA solidifies Sure Sports' entitlement to underwriting and other fees earned in exchange for its
23 performance of underwriting services. *See, e.g.*, Def. Exh. F, G, and I (Kane acknowledging Sure
24 Sports has fully performed and completed all underwriting services requested and/or required to be
25 performed, Sure Sports is entitled to full receipt of the underwriting fee, and that Kane has no
26 defenses that would prevent or preclude Sure Sports' receipt of the underwriting fee).

27 Furthermore, Trustee has failed to establish how Kane was adversely affected due to any
28 alleged noncompliance with the MAA. Kane's own deposition testimony cited in Trustee's

1 Opposition fails to establish adversity suffered at the behest of Sure Sports, with Kane openly
2 admitting that Sure Sports did not force him to take out any loan or do any action that would
3 knowingly or be reasonably expected to force Kane to file for bankruptcy. Kane's inability to make
4 payment of any loan is the direct result of Kane's problem gambling, poor spending habits, and
5 other misgivings that negatively impacted his ability to save and/or otherwise responsible manage
6 his millions worth of NHL career earnings. Moreover, Trustee's Complaint sets forth nothing more
7 than a conclusory statement that "As a result of Sure Sports' conduct as alleged herein, Trustee has
8 been harmed..." meaning that whatever actual damages suffered would be the result of Sure Sports'
9 noncompliance with the MAA. However, because Sure Sports is entitled to summary judgment
10 declaring that Sure Sports is not subject to such requirements (as explained above), it follows that
11 Trustee has not been adversely affected in a manner warranting any form of relief from this Court.

12 **II. Conclusion**

13 WHEREFORE, for the reasons set forth herein, Sure Sports respectfully requests that this
14 Honorable Court enter an Order granting Sure Sports' Motion for Summary Judgment, and any
15 other relief that the Court deems just and appropriate.

16 DATED: September 3, 2024

17 JEFFER MANGELS BUTLER & MITCHELL LLP

18 By: _____ /s/ Thomas M. Geher
19 _____
20
21 DATED: September 3, 2024

22 HEITNER LEGAL, PLLC

23 By: _____ /s/ Darren Heitner
24 _____
25 DARREN HEITNER
26 *Pro Hac Vice*

27
28 Attorneys for Sure Sports, LLC

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 1900 Avenue of the Stars, 7th Floor, Los Angeles, CA 90067-4308

A true and correct copy of the foregoing document entitled (specify): **DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**; will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) September 3, 2024, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- George Eugene Chikovani gchikovani@plylaw.com
- Thomas M. Geher tmq@jmbm.com, tmq@ecf.inforuptcy.com
- Darren Heitner darren@heitnerlegal.com
- Robert B. Kaplan rbk@jmbm.com
- Stephen G. Opperwall steve.opperwall@comcast.net
- Alan Wilmot alan@heitnerlegal.com

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL: On (date) September 3, 2024, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Gregg S. Kleiner
Rincon Law LLP
268 Bush Street, Suite 3335
San Francisco, CA 94104

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) September 3, 2024, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

SERVED BY OVERNIGHT MAIL

The Honorable Stephen L. Johnson
United States Bankruptcy Court/Northern District of California
United States Courthouse, Room 3035
280 South First Street
San Jose, California 95113-3099
Attn: Anna Lee

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

September 3, 2024 Billie Terry



Date

Printed Name

Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.